

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000261-001 DT

09/04/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

PATRICIA A TRACEY

v.

JOSE MARIE RIOJAS (001)

CARISSA ANN JAKOBE

MESA MUNICIPAL COURT - COURT
ADMINISTRATOR

MESA MUNICIPAL COURT -
PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2014-013112.

Defendant-Appellant Jose Marie Riojas (Defendant) was convicted in Mesa Municipal Court of failure to stop for a stop sign and failure to provide his driver's license. Defendant contends as follows: (1) The prosecutor failed to disclose the officer's integrity file; (2) the prosecutor failed to disclose the officer's notes; (3) after the trial started, the officer went to the scene and measured the distance from the stop sign to the street; and (4) the prosecutor cross-examined Defendant about any prior traffic citations. Defendant further contends all of these claims amount to prosecutorial misconduct. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On February 21, 2014, Defendant was cited for failure to stop for a stop sign, A.R.S. § 28-855(B); and failure to provide driver's license, A.R.S. § 28-1595(B). On June 24, 2014, Defendant's attorney made a request that the State produce Officer Kuntz's integrity file. On July 14, 2014, Defendant's attorney filed a Motion To Dismiss for Prosecutorial Misconduct contending the prosecutor intentionally withheld Officer Kuntz's integrity file. On July 17, 2014, the prosecutor filed a Response stating that, on July 2, 2014, the State received a one page "Concise Officer History," which the prosecutor concluded contained no *Brady* material. Nonetheless, on July 15, 2014, the prosecutor requested that the trial court conduct an *in camera* inspection of that document.

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Prior to the start of the trial, the trial court conducted its *in camera* inspection of the document the prosecutor submitted. (R.T. of Jul. 17, 2014, at 5.) The trial court denied Defendant's Motion To Dismiss because it "found that there are no items in Officer Kuntz's record that—of any *Brady* disclosable material or any material that's disclosable under any other legal authority." (*Id.*) Defendant's attorney said she understood the trial court's ruling, but contended the prosecutor should have disclosed the document "from the outset." (*Id.*) After listening to the prosecutor's response and the reply from Defendant's attorney, the trial court ruled that Defendant's right to due process had not been violated because the document contained no impeachable material under *Brady*, Rule 608, or Rule 609. (*Id.* at 12.)

Officer Michael Kuntz testified he was a motorcycle officer with the Mesa Police Department and was on duty on February 21, 2014. (R.T. of Jul. 17, 2014, at 15–16.) At about 7:08 p.m., he was at the southeast corner of the intersection of Country Club Drive and 2nd Avenue, which has a stop sign on the northeast corner 25 or 30 feet east of Country Club. (*Id.* at 18.) He said that, because there was no "stop bar" painted on 2nd Avenue, a driver would have to pull up to the edge of the roadway so that the driver would be able to see clearly the traffic on Country Club. (*Id.* at 19–22.) While there, he saw seven motorcycles traveling west on 2nd Avenue in a 2-2-2-1 formation. (*Id.* at 22–23.) The first two came to a complete stop and then proceeded south on Country Club; then the second two came to a complete stop and proceeded south; but when the third two approached Country Club, only the motorcycle on the left came to a complete stop, while the motorcycle on the right turned to go south on Country Club without stopping. (*Id.* at 22–24.) Officer Kuntz said that, when the second set of motorcycles came to a stop and thus the third set also came to a stop, the riders in the third set would have been about 10 feet from Country Club, which in Officer Kuntz's opinion would not have been close enough to Country Club to see the traffic. (*Id.* at 25.) Officer Kuntz then proceeded south and stopped the motorcycle that did not come to a complete stop. (*Id.* at 26.) He identified the driver as Defendant. (*Id.* at 26–27.) Defendant was not able to produce a driver's license, so Officer Kuntz cited Defendant for the two violations discussed above. (*Id.* at 27–29.)

On cross-examination, Defendant's attorney asked Officer Kuntz if there was a stop sign 25 to 35 feet back from the intersection of Country Club Drive and 2nd Avenue, and Officer Kuntz said that was an approximation. (R.T. of Jul. 17, 2014, at 31.) Defendant's attorney then asked whether the riders were wearing Hell's Angels identification, and Officer Kuntz acknowledged Defendant was not wearing Hell's Angels identification. (*Id.* at 32–34.) Officer Kuntz again said a driver would have to pull up to the edge of the roadway so that the driver would be able to see clearly the traffic on Country Club. (*Id.* at 36.) Defendant's attorney asked the following questions and received the following responses:

Q. . . . And the traffic that night was medium or moderate?

A. Well, it's the same thing.

Q. Was medium and moderate? Is that how you would describe it?

A. Yes.

Q. Okay. And medium to moderate.

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(R.T. of Jul. 17, 2014, at 37.) Officer Kuntz said that, from where Defendant had come to a complete stop (behind the second set), it was not safe to proceed onto Country Club. (*Id.* at 37–39.) Defendant’s attorney then asked Officer Kuntz if the stop sign was 20 to 30 feet back. (*Id.* at 42.)

In discussing whether Defendant said he was from Minnesota or Michigan, Officer Kuntz said he took notes the night of the event in question, and those notes would have been on the back of the citation. (R.T. of Jul. 17, 2014, at 51.) Later, when questioned about the traffic conditions, Officer Kuntz said he wrote the traffic conditions on the citation. (*Id.* at 54.) After later questions, Defendant’s attorney said she had not been provided with Officer Kuntz’s notes. (*Id.* at 58.) The trial court noted Officer Kuntz said he put his notes on the traffic citation, which had been provided to Defendant’s attorney. (*Id.* at 58–59.) Defendant’s attorney said she had never been provided with the back of the traffic citation. (*Id.* at 59.) Officer Kuntz said he filled out the citation electronically, including the notes section, and he assumed Defendant’s attorney had received everything he had written. (*Id.* at 63.) When Officer Kuntz offered to clarify what the notes were, Defendant’s attorney interrupted and made a motion to dismiss with prejudice. (*Id.* at 64–65.) In the exhibits Defendant’s attorney subsequently provided, the section entitled “Officer Notes” contains the following information:

Time Condition: NIGHT

Traffic Conditions: MEDIUM

Lighting: STREETLIGHTS

Dir. of Travel: S

SSN: REFUSED

DR#: 20140520601

The trial court denied Defendant’s motion to dismiss because any failure of Defendant’s attorney to get this information was not due to the prosecutor’s actions. (*Id.* at 65.) After further discussion, Defendant’s attorney renewed her motion to dismiss. (*Id.* at 66.) Officer Kuntz again described what he did to generate the citation and the information he included, and that he assumed Defendant’s attorney had received everything he had written. (*Id.* at 68.) The trial court ruled it would continue the trial (which was a non-jury trial) and give Defendant’s attorney the opportunity to interview Officer Kuntz again about the disclosure. (*Id.* at 72.) The prosecutor noted that, during Defendant’s attorney’s interview of Officer Kuntz, she had been shown the exact copy of the citation that contained the Officer’s notes. (*Id.* at 73.) The trial court said it did not see any prosecutorial misconduct in what had happened, and that what happened did not warrant a dismissal. (*Id.* at 74–75.)

When the trial resumed, Defendant’s attorney again asked Officer Kuntz whether the stop sign was 25 to 30 feet back from the edge of Country Club, to which he said “No.” (R.T. of Aug. 19, 2014, at 18.) He said that, since the recess of the trial, he had gone to the intersection and measured the distance. (*Id.* at 19.) He agreed he had previously testified the sign was 25 to 30 feet back from the edge of Country Club. (*Id.*) During the discussion about the two versions of the traffic citation, the prosecutor again stated Defendant’s attorney was shown the copy with the Officer’s notes. (*Id.* at 32.)

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On re-direct examination of Officer Kuntz, the following exchange occurred:

[The Prosecutor]: Officer Kuntz, (indiscernible) actual distance between the edge of the roadway and the stop sign?

A. I did.

Q. And what is it?

A. 35 feet.

Q. So your initial calculation wasn't too far off?

A. It wasn't too far out.

Q. And have you ever been at the same vantage point that you saw the defendant on the night in question when he made his last stop before proceeding southbound on Country Club?

A. I have many times been at that intersection. On the same day I took the measurement for how far the location of the stop sign was, that same day, I got off my bike in the position where I could adequately see traffic, and I measured where my seat was to the edge of the—close to the edge of the (indiscernible) was where the (indiscernible) lines are.

Q. And when you got to the vantage point where the defendant was on the night in question the last time he stopped before going southbound, did he have adequate vision to see the traffic coming in both directions on Country Club?

[Defendant's attorney]: Objection, speculation. Wasn't at his vantage point. He's already testified to that.

[The Prosecutor]: No. He's testified that he's been back to the scene, he's measured the distances, and he's been at the same vantage point.

[Defendant's attorney]: Those haven't even been disclosed. Again, we're in the middle of the trial (indiscernible) and then we have no evidence.

THE COURT: Over—overruled, overruled.

[Defendant's attorney]: This is crazy.

THE COURT: Overruled.

(R.T. of Aug. 19, 2014, at 42.) After Officer Kuntz's testimony, the State rested. (*Id.* at 47.)

Defendant then testified. (R.T. of Aug. 19, 2014, at 48.) Defendant testified about riding motorcycles and said that he was "a very good rider." (*Id.* at 51.) He said he was never in a motorcycle accident. (*Id.* at 52, 53.) At the time in question, he contended he stopped, looked both ways, and then proceeded with caution. (*Id.* at 54.) On cross-examination, the prosecutor asked Defendant if he had ever committed a traffic violation, and Defendant answered "but up until this traffic ticket, I haven't" and "I've only got tickets in the last six months" (*Id.* at 61.) When the prosecutor asked if Defendant had committed a traffic offense but had not received a citation for such offense, the trial court sustained Defendant's attorney's objection of "argumentative." (*Id.* at 63.)

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After Defendant's testimony, the defense rested. (R.T. of Aug. 19, 2014, at 67.) After hearing arguments from the attorneys, the trial court found Defendant guilty of failing to provide his driver's license and took under advisement the charge of failure to stop for a stop sign. (*Id.* at 73, 74, 76.) On August 25, 2014, the trial court found Defendant guilty failing to stop for a stop sign. The trial court later imposed sentence, which included fines and no probation. (R.T. of Oct. 13, 2014, at 7.) On October 20, 2014, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES.

A. Was the State required to disclose the officer's integrity file.

Defendant contends the State was required to disclose Officer Kuntz's integrity file. The state is required to disclose all evidence favorable to the defendant whether or not the defendant requests such information. *State v. Dumaine*, 162 Ariz. 392, 405-06, 783 P.2d 1184, 1197-98 (1989) (because the evidence concerning the witness's mental condition would not have been admissible, the prosecutor did not err in not disclosing it prior to trial). In the present case, the prosecutor reviewed Officer Kuntz's integrity file and concluded it contained no evidence that would have been favorable or useful to Defendant, but then as a precaution, asked the trial court to conduct an *in camera* review of that file. The trial court reviewed that file and found it contained nothing that would have been favorable or useful to Defendant. This Court has reviewed that file and concludes the trial court did not abuse its discretion in its finding. The prosecutor therefore did not err in not disclosing Officer Kuntz's integrity file.

B. Did the State fail to disclose the officer's notes.

Defendant contends the State failed to disclose Officer Kuntz's notes. The applicable rule provides as follows:

b. Supplemental Disclosure; Scope. Except as provided by Rule 39(b), the prosecutor shall make available to the defendant the following material and information within the prosecutor's possession or control:

(1) The names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements

Rule 15.1(b)(1), ARIZ. R. CRIM. P. In the present case, the prosecutor noted that, when Defendant's attorney interviewed Officer Kuntz, she had the copy of the citation that contained his notes. (R.T. of Jul. 17, 2014, at 73; R.T. of Aug. 19, 2014, at 32.) It thus appears Defendant's attorney received the discovery to which she was entitled.

Moreover, even assuming there was a discovery violation, (1) the choice of a sanction is within the discretion of the trial court, (2) the sanction should be proportionate to the harm caused, (3) the sanction should be the least restrictive under the circumstances, and (4) the defendant must show prejudice in order to obtain relief on appeal. *State v. Roque*, 213 Ariz. 193, 141 P.3d 368, ¶ 50 (2006); *State v. Krone*, 182 Ariz. 319, 322, 897 P.2d 621, 624 (1995). In the present case, Defendant's attorney acknowledged that the notes "contain nothing significant." (Appellant's Opening Brief at 23, l. 10.) A review of the record supports that conclusion. Officer Kuntz's notes contained

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the following information: Time Condition: NIGHT; Traffic Conditions: MEDIUM; Lighting: STREETLIGHTS; Dir. of Travel: S; SSN: REFUSED. The front of the traffic citation stated the offense occurred at 7:08 p.m., so Defendant's attorney already was aware the offense happened at night. Assuming Defendant remembered anything about the events that night, he would have remembered the traffic conditions were medium, the lighting was by streetlights, that he traveled south, and that he refused to give his social security number to the officer. Thus, Officer Kuntz's notes did not give Defendant any information he did not already have. The trial court continued the trial to give Defendant's attorney the opportunity to conduct a second interview of Officer Kuntz, which appears to have remedied any conceivable harm caused by any claimed lack of disclosure. Thus, the trial court did not abuse its discretion in its actions taken.

C. Has Defendant waived any issue about the officer's measuring the distance from the stop sign to the street.

Defendant contends he was denied a fair trial because Officer Kuntz testified about measuring the distance from the stop sign to the street. If a trial court admits evidence, a party may not claim error on appeal unless (1) that party makes a timely objection stating the specific ground of the objection, and (2) the evidence affects a substantial right of the party. Rule 103(a)(1), ARIZ. R. EVID. In the present case, Defendant's attorney did not object when Officer Kuntz testified that, as a result of his measurement, he determined the distance from the edge of the roadway to the stop sign was 35 feet. (R.T. of Aug. 19, 2014, at 42.) It was only when Officer Kuntz was asked his opinion about Defendant's ability to see the traffic on Country Club Drive that Defendant's attorney made the objection of "speculation." (*Id.* at 43.) Because Defendant's attorney never made an objection that Officer Kuntz should not have gone to the scene and measured the location of the stop sign, Defendant has waived that claim on appeal.

Moreover, the testimony about the location of the stop sign did not affect a substantial right of Defendant's. Officer Kuntz testified Defendant stopped about 10 feet from Country Club Drive and that Defendant would not have been able to see clearly the traffic on Country Club at that point. (R.T. of Jul. 17, 2014, at 19–22.) Thus, it did not matter whether the stop sign was 20, 25, 30, or 35 feet away from Country Club Drive. Additionally, Defendant does not dispute the fact that the stop sign is 35 feet from Country Club Drive, a fact that anyone who has access to a computer and Google Maps can see.

D. Did the trial court abuse its discretion in allowing the prosecutor to cross-examine Defendant about his driving record.

Defendant contends the trial court abused its discretion in allowing the prosecutor to cross-examine him about his driving record. Under the rules of evidence, when a defendant has put his or her character in evidence, the opposing party is permitted to ask on cross-examination about specific instances of the person's conduct. Rule 404(a)(1) and Rule 405(a), ARIZ. R. EVID. In the present case, Defendant placed his character in evidence under Rule 404(a)(1) by testifying that he was "a very good rider." (R.T. of Aug. 19, 2014, at 51.) The prosecutor was then permitted by Rule 405(a) to "inquir[e] into relevant specific instances of [Defendant's] conduct." The trial court therefore did not abuse its discretion in allowing that cross-examination.

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E. Do the above four claims of error amount to prosecutorial misconduct.

Defendant contends the above four claims of error amount to prosecutorial misconduct. Other than Defendant's attorney's *ipse dixit* statement that each of the above claims of error amounts to prosecutorial misconduct, she has not argued why they amount to prosecutorial misconduct as opposed to mere trial error. Because Defendant's attorney has not made that argument, Defendant is not entitled to relief on this claim.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not commit any error in overruling Defendant's attorney's objection, and concludes Defendant has failed to show prosecutorial misconduct.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.